IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

NO. 41895-9-II

STATE OF WASHINGTON
RESPONDENT

VS.

RICHARD ROY SCOTT
APPELLANT

BRIEF OF RESPONDENT

David Burke
DAVID BURKE - WSBA# 16163
PACIFIC COUNTY PROSECUTOR

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

Page

WASHINGTON CASES

Page

Page

OTHER RULES AND REGULATIONS

A.

STATE'S RESPONSE TO APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court did not err in dismissing the Appellant's renewed motion to withdraw his guilty plea.

2. The trial court did not err in denying the Appellant a reference hearing pertaining to whether he should be allowed to withdraw his guilty plea.

3. While the trial court's Conclusions of Law are only partially correct, the Appellant should not be allowed to have a reference hearing based on his demeanor and vexatious behavior.

B.

STATE'S RESPONSE TO APPELLANT'S ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The trial court did not err in dismissing Appellant's renewed motion for a reference hearing based on the Appellant's demeanor and vexatious behavior.

C.

STATEMENT OF THE CASE

The State accepts the Appellant's Statement of the Case.

D.

ARGUMENT

1. The Appellant's motion to vacate his guilty plea was not decided on the merits and therefore is not procedurally barred from being heard; nevertheless, the State does not concede that this matter should be remanded to the trial court for a reference hearing.

On June 10, 2010 and July 16, 2010, Judge Sullivan signed orders which allowed Mr. Scott to withdraw his motion to withdraw his underlying guilty plea. See Appendix "A", Findings of Fact Nos. 2, 10-11. The action of the Court essentially terminated this case. Mr. Scott, through his attorney at the time, Peter Tiller, sought to have this decision

overturned. The Court denied Mr. Tiller's motion under CrR 7.8(b)(5) on July 23, 2010. Mr. Scott subsequently filed a new motion to vacate his guilty plea. Mr. Scott claimed that he had uncovered newly discovered evidence.

The Court dismissed this new motion based on State v. Brand, 120 Wash. 2d 365, 842 P.2d 470 (1992). ("a court may not consider a CrR 7.8(b) motion if the movant has previously brought a collateral attack on similar grounds," id, at 370). See Appendix "A", Conclusion of Law number 2. However, the Court did not address the holding of In re the Personal Restraint of VanDelft, 158 Wash. 2d 731, 737-738, 147 P.3d 573 (2006) which states that successive petitions for similar relief cannot be dismissed unless the relevant issue had been previously determined on the merits. See also In re the Personal Restraint of Stoudmire, 145 Wash. 2d 258, 263, 36 P.3d 1005 (2002), and In re the Personal

Petition of Haverty, 101 Wash. 2d 498, 502-503, 681 P.2d 835 (1984).

In the present matter, Judge Sullivan never decided Mr. Scott's case on the merits of his claims. Hence, the State agrees with the Appellant on this narrow point See Appellant's Brief at 10-12. However, the State does not believe that this point of law requires the Court of Appeals to remand this matter for a reference hearing.

2. The doctrine of "abuse of the writ" applies in this case; therefore, this case should not be remanded for a reference hearing.

Under In re the Personal Restraint Petition of Haverty, a successive petition can be dismissed even when the merits of a motion have not been determined if "there has been an abuse of the writ on motion remedy." 101 Wash. 2d at 503 (citing Sanders v. United States, 371 U.S. 1, 17, 83 S. Ct. 1068, 10 L.Ed. 2d 148 (1963)). As succinctly stated in

Kuhlmann v. Wilson, 477 U.S. 436 106 S. Ct. 2616, 91 L.Ed. 2d 364 (1986):

> The concept of "abuse of the writ" is founded on the equitable nature of habeas corpus. Thus, where a . . . [litigant] engages in other conduct that "disentitle[s] him to the relief he seeks," the . . . court may dismiss the subsequent petition on the ground that the. . .[litigant] has abused the writ.

477 U.S. at 444 n. 6 (plurality opinion) (quoting Sanders, 373 U.S. at 17-19). Moreover, "[n]othing in the traditions of habeas corpus requires . . . courts to tolerate needless piecemeal litigation, to entertain collateral proceedings whose only purpose is to vex, harass or delay." Sanders, 373 U.S. at 18.

Since the tenor of the Sanders opinion was cited with approval in Haverty, the applicable standard for habeas

petitions in federal court similarly applies to personal restraint petitions/CrR 7.8 motions. Consequently, if Mr. Scott abused the writ process, he should be barred from relitigating his case. Although Judge Sullivan did not make a Finding of Fact or Conclusion of Law that Mr. Scott abused the writ process, the record is clear that Mr. Scott was a vexatious litigant. The fourteen Findings of Fact adopted by Judge Sullivan, which are verities on appeal because they were not challenged by the Appellant, (see State v. Hill, 123 Wash. 2d 641, 644, 870 P.2d 313 (1994)), show that Mr. Scott actively chose not to cooperate with the Court. This non-compliance is most graphically demonstrated by Mr. Scott's refusal to be transported to the Pacific County Superior Court. RP, July 23, 2010 at 12-16. See especially Appendix "A", Findings of Fact nos. 5, 6-8.

While Judge Sullivan was silent with regard to the doctrine of abuse of the writ, the Court of Appeals can "affirm a trial court's decision on a different ground if the record is sufficiently developed to consider the ground fairly." State v. Villarreal, 97 Wash. App. 636, 643, 984, P.2d 1064 (1999)(quoting State v. Sondergaard, 86 Wash. App. 656, 657-658, 938 P.2d 351 (1997)). In this instance the record is replete with examples of Mr. Scott disrupting the Court while he was participating in courtroom proceedings via the telephone. This behavior was so egregious that at one point Mr. Scott even "hung up" on Judge Sullivan. RP, February 25, 2011 at 13-16. Judge Sullivan's Findings of Fact also demonstrate that Mr. Scott was not willing to follow routine directives of the Court such as allowing himself to be transported from McNeil Island to Pacific County.

In short, the State asserts that Mr. Scott's behavior was sufficiently vexatious, harassing, and dilatory to warrant the application of the abuse of the writ doctrine. If the Court of Appeals remands this case for a reference hearing, there is little reason to believe that Mr. Scott's behavior will improve. Moreover, since Mr. Scott has refused to be transported to the Pacific County Superior Court, there is no reasonable way for the Court to conduct a reference hearing in the absence of Mr. Scott.

Thus, an order remanding this case for a reference hearing likely would prove to be futile. Under such circumstances, the Court of Appeals should rule that Mr. Scott's behavior has been sufficiently disruptive so as to invoke the abuse of the writ doctrine. The record of proceedings along with Judge Sullivan's Findings of Fact, provides a sufficient record to allow the Court of Appeals to

see the full panoply of Mr. Scott's behavior. The Court of Appeals should find that Mr. Scott's conduct disentitles him to the reference hearing which he seeks.

3. If this case is remanded to the Superior Court, Judge Sullivan should preside over the proceedings.

The Appellant argues that if this case is remanded, a different trial judge should preside over the reference hearing. Appellant's Brief at 14-18. The Appellant believes that Judge Sullivan is biased because he expressed animosity toward Mr. Scott. The Appellant supports this assertion by citing Judge Sullivan's comment that Mr. Scott is "playing with the Court." RP, July 23, 2010 at 14. Appellant's Brief at 15.

The context of this quotation does not support the Appellant's assertion that "[t]he judge was clearly tired of dealing with Scott." Id. Judge Sullivan did not display anger

toward Mr. Scott; the judge simply took time to describe how Mr. Scott had frustrated the court system. See RP July 23, 2010 at 14-17. The following quotation highlights the judge's position:

> Mr. Richard Roy Scott, I believe, has shown through his communications on the phone in this court, which there's quite a number of them, that he's intelligent, that he understands the mechanics, the basics anyway, of the jurisprudence and criminal procedures. I mean, I've never seen Mr. Scott in person. But Mr. Scott cannot control the system. That's what he's trying to do. He's playing with the Court. You know, I'm totally convinced -- and I am the one who's dealt with this case, not any other judge. I am the judge who's dealt with this case since the inception of the appeal. This Court has worked extremely hard and invested thousands and thousands of dollars in attorneys and investigators willingly so to try to get a hearing set up and functioning and have a hearing in this court. Mr. Scott has frustrated that every step of the way by his actions in the past and by his most

> recent actions. He wants to be in control. Well, he is not in control. . . .

RP, July 23, 2010 at 14-15.

It is clear from this passage that Judge Sullivan, inter alia, is describing the difficulty the Court experienced in having to appoint multiple attorneys for Mr. Scott and in transporting Mr. Scott to the Pacific County Superior Court. In emphasizing that the Court is in control of the judicial process, Judge Sullivan is reiterating the obvious point that Mr. Scott is a litigant rather than an entity who makes rulings. Further, at a later point in the Court's oral ruling, Judge Sullivan lays out Mr. Scott's options:

> I find that Mr. Scott is stuck with his choice. It was voluntary on his part. I'm not going to use the phrase a second bite at the apple because I don't view it actually as the second bite at the apple. It's just simply that he knew what he was doing when he requested the Court to cancel that transport. He knew exactly

> what he was doing. He is now stuck with his choice. Obviously, if he wishes to have either moved to have me reconsider this decision today or let it go to finality and then appeal it, that's certainly his right. I've tried all along to honor every single request that Mr. Scott has had in terms of providing counsel and trying to be as understanding as I can. Mr. Scott, he lost this one as far as this particular hearing. I'm totally convinced he knew exactly what he was doing. He's now going to have to live with his choices.

RP, July 23, 2010 at 17.

In essence, the fact that Judge Sullivan ruled against Mr. Scott in no way indicates that the judge is biased against Mr. Scott. The Appellant cites Custody of R, 88 Wash. App. 746, 947 P.2d 745 (1997), State v. Talley, 83 Wash. App. 750, 923 P.2d 721 (1996), State v. Cloud, 95 Wash. App. 606, 976 P.2d 649 (1999) and State v. Sledge, 133 Wash. 2d 828, 947 P.2d 1199 (1997) to support his claim of bias. These cases, however, are inapposite. Custody of R involved

dialog where the judge showed anger. Judge Sullivan did not display anger. State v. Talley pertained to a situation where a judge had predetermined that an exceptional sentence was appropriate. In our case, Judge Sullivan in no way indicated that he had made up his mind with regard to any future hearings. State v. Cloud pertained to a judge who had considered improper evidence. In the present case, there has been no finding that Judge Sullivan considered improper evidence. And finally, State v. Sledge involved a judge who expressed his views regarding the disposition of a case before a new disposition hearing was held. Once again, Judge Sullivan engaged in no similar course of action.

To recapitulate, "[a] trial court is presumed to perform its functions regularly and properly without bias or prejudice." Business Services of America II v. Wafertech, 159 Wash. App. 591, 600, 245 P.3d 257 (2011). "The test for

determining whether a judge's impartiality might reasonably be questioned is an objective one that assumes the reasonable person knows and understands all the relevant facts . . . The party claiming bias or prejudice must support the claim with evidence of the trial court's actual bias [citation omitted]." Id. Moreover, even if Judge Sullivan made an error in applying the law, that fact "is not evidence of the trial judge's actual or potential bias . . . ." Id.

Consequently, because there is nothing in the record that indicates that Judge Sullivan has prejudged any issues that may need to be determined, Judge Sullivan should not be ordered to recuse himself. While the State does not concede that this matter should be remanded to the Superior Court for an evidentiary hearing, the entire record shows that Judge Sullivan has bent over backwards to accommodate Mr.

Scott. If the Court of Appeals remands this case, there is no convincing reason why Judge Sullivan should be removed from the case. Accordingly, the Appellant's request for recusal should be denied.

E.

CONCLUSION

For the reasons listed above, the decision of the trial court should be upheld. In the alternative, Judge Sullivan should preside over any further proceedings.

Respectfully Submitted:

David Burke

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PACIFIC COUNTY PROSECUTOR

APPENDIX A

FILED

2011 FEB 25 PM 12:01

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PACIFIC COUNTY

STATE OF WASHINGTON, Plaintiff, vs. **RICHARD ROY SCOTT,** Defendant.	NO. **01-1-00082-7** FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DENYING DEFENDANT'S SUNDRY MOTIONS

The Court hereby enters the following Findings of Fact, Conclusions of Law, and Order pertaining to the Defendant's motions which were heard on December 15, 2010.

I. FINDINGS OF FACT

1. A hearing was held in Pacific County Superior Court on December 15, 2010, to address Richard Roy Scott's motions: (1) to vacate his guilty plea and judgment and sentence; (2) to change venue; (3) to change the judge hearing this case; (4) to obtain funding for an investigator; and (5) to proceed pro se and to have standby counsel appointed. Mr. Scott appeared by telephone and represented himself. The State of Washington was

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339

represented by David Burke, the Pacific County Prosecutor.

2. At the outset of the hearing on December 15, 2010, the defendant withdrew his motion to change venue and his motion to change the judge hearing this case. Mr. Scott also asserted that in lieu of vacating his guilty plea, he should be allowed to have a "reference" hearing. See Finding of Fact No. 4. The State opposed Mr. Scott's contention that a "reference" hearing should be scheduled.

3. Mr. Scott was acting pro se at the hearing on December 15, 2010, because his counsel, Mr. Peter Tiller, was given permission to withdraw from the case on July 23, 2010. Prior to Mr. Tiller being appointed to represent Mr. Scott, the defendant had been represented by Amanda Kleespie, Harold Karlsvik and Michael Turner. Mr. Tiller also previously represented Mr. Scott at the Court of Appeals.

4. In a collateral attack brought by Mr. Scott, the Court of Appeals in State v. Scott , 150 Wash. App. 281, 207 P.3d 495 (2009), ruled that Mr. Scott was entitled to a "reference" hearing to contest whether there was a sufficient factual basis to support his guilty plea.

5. After this ruling of the Court of Appeals became final, the Pacific County Superior Court held numerous hearings in an effort to comply with the ruling of the Court of Appeals. The "reference" hearing could not take place

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quickly because witnesses lived out of state, were otherwise unavailable, or their whereabouts were unknown.

6. Because of the difficulty the Court had in assessing the credibility of Mr. Scott and his contentions, the Court ordered on May 28, 2010, that Mr. Scott needed to be present at future hearings. The Court indicated that Mr. Scott would be transported from the Special Commitment Center on McNeil Island to the Pacific County Superior Court. Subsequent to this order, Mr. Scott objected to being transported, ostensively due to his perceived fear of being accosted and harmed while being transported and housed at the Pacific County Jail.

7. On June 4, 2010, the Court signed an order stating that the "[d]efendant's actions have prevented the Court from hearing all def's [defendant's] motions in a timely manner."

8. On June 7, 2010, the Court signed an order that required Mr. Scott to be present in court on June 11, 2010. The Court inter alia stated: "The Court needs to observe the Defendant in person, conduct a colloquy with Defendant and then decide whether to allow Mr. Tiller to withdraw, appoint new counsel or proceed with Mr. Tiller acting as standby counsel and the Defendant representing himself." The Court made this ruling because time was of the essence; the "reference" hearing was scheduled for July 7, 2010,

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and there was only a small window available to address procedural and substantive issues.

9. On June 10, 2010, the Court signed an order quashing the transport order and striking the July 7, 2010 "reference" hearing. The Court addressed (1) Mr. Tiller's faxed motion to withdraw Initial Motion to Vacate Alford Plea and Motion to Strike Order of Transport and (2) Mr. Scott's own motion to withdraw his Motion to Vacate. The Court ruled that "[n]o further action is required."

10. Subsequently, on June 22, 2010, the State filed a motion seeking to clarify the order that was entered on June 10, 2010. This motion was heard on July 2, 2010, but a written order was not signed until July 16, 2010. Mr. Scott was present by telephone on July 2, 2010. On July 16, 2010, the Court tried to reach Mr. Scott by telephone at the Special Commitment Center, but Mr. Scott did not answer the telephone. Mr. Tiller was in court representing Mr. Scott. The Court clarified its order of June 10, 2010, to indicate that Mr. Scott's motion to withdraw his motion to withdraw his guilty plea is granted. The Court stated that "[b]ecause this order terminates this case, the evidentiary hearing ordered by the Court of Appeals is not necessary." The Court's order obviated any need for further hearings. Nevertheless, Mr. Tiller filed a motion for relief under CrR 7.8(b)(5).

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11. The CrR 7.8(b)(5) motion that was filed by Mr. Tiller on July 16, 2010, was heard on July 23, 2010. Once again, the Court tried to contact Mr. Scott at the Special Commitment Center, but Mr. Scott did not answer the telephone. Mr. Tiller, however, was present representing Mr. Scott. The defendant's motion under CrR 7.8(b)(5) was denied, and Mr. Tiller was allowed to withdraw from the case.

12. Mr. Scott had the opportunity to appeal the final decision of the Pacific County Superior Court which granted Mr. Scott's motion to withdraw his motion to withdraw his guilty plea. Mr. Scott, objected to this decision, but he did not file a timely appeal with the Court of Appeals.

13. Instead, Mr. Scott filed a new motion to vacate his guilty plea on August 18, 2010. He also filed additional motions which are listed in Finding of Fact no. 1. Mr. Scott claimed that he had uncovered newly discovered evidence. Subsequently, on December 7, 2010 and December 13, 2010, Mr. Scott filed additional documentation to support his claim of actual innocence.

14. The material provided by Mr. Scott for the hearing on December 15, 2010, addresses the same issues that were litigated previously, viz., Mr. Scott's assertion that he could not have committed the crime to which he pled guilty. The evidence under penalty of perjury that was reviewed by the Court does not differ significantly in either quality or quantity from the

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evidence presented previously.

II. CONCLUSIONS OF LAW

1. The Pacific County Superior Court has jurisdiction to hear this matter.

2. Although Mr. Scott does not refer to a court rule in making his motion to vacate his guilty plea, CrR 7.8(b) provides the only basis upon which a superior court could grant the defendant's requested relief. While CrR 7.8(b) does contain a provision pertaining to new discovered evidence, any

> motion under CrR 7.8(b) is expressly subject to RCW 10.73.140 which provides:
>
> > If a person has previously filed a petition for personal restraint, the court of appeals will not consider the petition unless the person certifies that he or she has not filed a previous petition on similar grounds, and shows good cause why the petitioner did not raise the new grounds in the previous petition. . . .

State v. Brand, 120 Wash.2d 365, 369, 842 P.2d 470 (1992).

Thus, "a court may not consider a CrR 7.8(b) motion if the movant has previously brought a collateral attack on similar grounds." Id. at 370. Because Mr. Scott previously brought a collateral attack on similar grounds, and because the present motion does not differ significantly in either the quantity or quality of the evidence presented, Mr. Scott's motion to vacate his guilty plea should be denied. Similarly, Mr. Scott should not be granted a "reference" hearing for the reasons listed above.

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3. The Court only needs to consider Mr. Richard Roy Scott's renewed motion to vacate his guilty plea, because the motions for change of venue and change of judge were withdrawn by Mr. Scott. Mr. Scott's motions for funding for an investigator and for the appointment of standby counsel are not germane, because the Court concludes that Mr. Scott has not made a sufficient threshold showing to allow this matter to go forward. Therefore, these motions also should be denied.

III. ORDER

Mr. Richard Roy Scott's motions which were filed on August 18, 2010 and which were argued on December 15, 2010, are decided as follows:

Mr. Scott's motion to vacate his guilty plea is denied. The Court also denies Mr. Scott's latest request for a "reference" hearing. Mr. Scott's motion for funding for an investigator is denied. Finally, Mr. Scott's motion for the appointment of standby counsel is denied.

DATED this 25th day of February, 2011.

JUDGE

Presented by:

David J. Burke

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
Appellant
RICHARD ROY SCOTT,
Respondent

NO 41895-9-II

AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
) ss.
COUNTY OF PACIFIC)

VICKI FLEMETIS, being first duly sworn on oath, deposes and says:

I am the Office Administrator for the Prosecuting Attorney's Office for Pacific County, Washington.

That on 11/16/11, I mailed 2 copies of Respondent's Brief to:

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ATTORNEY AT LAW
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VICKI FLEMETIS

SUBSCRIBED & SWORN to before me this 14th day of November, 2011.

NOTARY PUBLIC in and for the State of Washington, residing at: RAYMOND

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, RICHARD ROY SCOTT, Appellant.	NO 41895-9-II DECLARATION OF DOCUMENT FILING AND SERVICE

VICKI FLEMETIS, under penalty of perjury, hereby declare as follows:

I am the Office Administrator for the Prosecuting Attorney's Office for Pacific County, Washington.

That on November 15th, 2011, I E-filed and E-served a copy of Respondent's Brief to:

Court of Appeals Clerk - coa2filings@courts.wa.gov

Casey Grannis
Attorney for Appellant - sloanej@nwattorney.net

Dated: November 15th, 2011.

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